FILED

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

KIM MICHAEL HAINZE,
Petitioner

v.

ED RICHARDS, Williamson County Sheriff;
STEVE ALLISON, KEVIN HALLMARK, and
SCOTT ZION, Williamson County Sheriff's Deputies,
individually and in their official capacities; and
WILLIAMSON COUNTY, TEXAS,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Court of Appeals err in refusing to apply this Court's broad mandate in *Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), to law enforcement agencies, responding to emergency calls for assistance in potential suicide situations involving persons with mental disabilities?

II. Does Title II of the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12132-12134) apply to the non-arrest and pre-arrest activities of law enforcement agencies, responding to emergency calls for assistance in potential suicide situations, particularly when the agency has advance notice of the person's mental disability?

III. Does Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) apply to the non-arrest and pre-arrest activities of law enforcement units, responding to emergency calls for assistance in potential suicide situations, especially when the entity has advance notice of the individual's disability?

IV. Is the Fifth Circuit's application of *Yeskey* to requests of law enforcement for emergency medical assistance at variance with the Tenth Circuit's and Eighth Circuit's applications of *Yeskey*, and, if so, are the later more correct interpretations of *Yeskey* than the Fifth Circuit's?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit in *Hainze v. Richard* is reported at 207 F.3d 795 (5th Cir. 2000), and included in Appendix A.

The opinion of the United States District Court for the Western District of Texas is in Appendix C.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on April 7, 2000. On April 19, Petitioner filed a Petition for Rehearing *en Banc* which the Court of Appeals denied on May 12, 2000 (Appendix B). This Petition for Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Americans with Disabilities Act - 42 U.S.C. § 12132:

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Americans with Disabilities Act - 42 U.S.C. § 12133:
The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794(a)) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of [42 U.S.C. § 12132].

Rehabilitation Act - 29 U.S.C. § 794:

Nondiscrimination under Federal grants and programs
(a) ... No otherwise qualified individual with a disability in the United States, as defined in [29 U.S.C. § 706(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of --

(1) (A) a department, agency, special purpose district, or other instrumentality of a State or of a local government ....

28 C.F.R. § 35.105 - Self-evaluation:

(a) A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and, to the extent modification of any such services, policies, and practices is required, the public entity shall proceed to make the necessary modifications.

. . . .

(d) If a public entity has already complied with the self-evaluation requirement of a regulation implementing section 504 of the Rehabilitation Act of 1973, then the requirements of this section shall apply only to those policies and practices that were not included in the previous self-evaluation.

28 C.F.R. § 35.130 - General Prohibitions Against Discrimination:

(a) No qualified individual with a disability shall, on the basis

of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability-

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with said, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(vi) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;

. . . .

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

. . . .

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

STATEMENT OF THE CASE

After they returned home from family wedding on a Saturday night in November 1998, the aunt and uncle of Petitioner Kim Michael Hainze became alarmed at the state of his mental illness and his threats of suicide. When Hainze refused to let them take him to the hospital for emergency treatment, his aunt called the Williamson County sheriff's department for emergency assistance in taking him to the hospital that had agreed to accept him.

That call for assistance almost cost Hainze his life. Rather than helping transport him to the hospital, a Williamson County deputy sheriff shot Hainze through the chest with a hollow-point bullet, and nearly killed him.

Respondent Steve Allison did the shooting. Respondents Kevin Hallmark and Scott Zion, also Williamson County deputies, were present with Allison.

Mr. Hainze's aunt had told the deputies, before they arrived at the scene, that he was suicidal, that he might possibly attempt to commit "suicide by cop,"[1] that he had a

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[1] "Suicide by cop" refers to a situation in which a person attempts to commit suicide by provoking the police to use deadly force against him or her.

history of depression, and was under the influence of alcohol and antidepressants.

After the family's call for emergency assistance, Allison, Hallmark, and Zion drove, in separate vehicles, to the convenience store to which Mr. Hainze had walked in his bare feet. On arriving at the store, the officers observed Hainze standing near the passenger door of a pickup truck occupied by two persons. Hainze appeared to be holding the door handle and talking to them.[2]

Allison exited his vehicle, drew his weapon, and ordered Hainze to move away from the truck. Hainze responded with some profanities and began walking toward Allison. Zion and Hallmark had also exited their vehicles, and had drawn and aimed their weapons at Hainze. The deputies were standing at different angles to Hainze and had him covered from three directions.

As Hainze approached him, Allison saw what he believed to be a pocket knife in his hand.[3] When Hainze was within four to six feet, Allison, without doing more and without warning Hainze to stop or otherwise desist, fired two shots in rapid succession, point-blank, one of which went through his chest. This all occurred within twenty to thirty seconds of

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[2] The individuals were Hainze's uncle, Tracy Cluck, and his son Christopher, who were trying to coax Hainze to voluntarily admit himself to the hospital.

[3] Whether Mr. Hainze had a pocket knife in his hand or not is the only fact issue in dispute. Mr. Hainze vigorously contended that he did not. Other than this observation, Petitioner accepts the Fifth Circuit's outline of the facts.

Allison arriving on the scene.

Immediately following the shooting, Mr. Hainze's aunt arrived on the scene and instructed Allison to call EMS. Hainze survived his severe injuries.

Allison, the lead deputy on the scene, had had mental health training, but did not abide by a number of procedures and guidelines in responding to the mental health call. Rather, he testified that, as a matter of department policy, he had to, and did, handle the Hainze call for emergency assistance as he would handle a call that a crime was in progress, and did not utilize his mental health training.

In fact, Allison acted precipitously in handling this call for emergency assistance. He never tried to engage Hainze in conversation, never tried to give him space by backing away, never tried to "talk him down," and never attempted to defuse the situation in any fashion. Nor did Allison give any warning to Hainze to drop the pocket knife, or he would shoot him if he did not do so. Allison never stated to Hainze the reason for his presence. He never tried a tactical retreat behind his vehicle to help calm the situation. Allison did not use any less deadly weapon than his gun, even though Hainze only allegedly had a pocket knife and was four to six feet away when Allison fired twice, and the other two deputies had their guns drawn on Hainze.

Even though Allison *before he arrived at the scene* knew that Hainze was mentally ill and possibly wanted to commit suicide and even provoke the police to assist in his suicide, Allison nevertheless treated the Hainze call as any other incident, as opposed to properly treating it as an emergency mental health call. He acted precipitously. Rather than prevent a suicide from occurring, Allison very nearly accomplished it.

The "policy" of the Williamson County Sheriff's Department "for the use of force in the seizure of persons" does not address the question of taking persons into custody who are suicidal or who have mental illness. In fact, the Department has no policy at all that applies to emergency calls of this nature.

Moreover, neither Williamson County nor the Sheriff had conducted any self-evaluation plan for modifying police procedures and practices as they apply to persons with mental illness, generally, or in the context of emergency assistance calls. This process was required by Title II of the Americans with Disabilities Act to have been done by January 1993 -- five years before the shooting.

As a result of the shooting, Mr. Hainze brought suit,[4] seeking relief under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12132-12134 (the "ADA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504").

The claims, brought against Williamson County and the Sheriff in his official capacity, were based on their failure to formulate and implement any policy and procedure addressing mentally ill persons who may be subject to emergency calls for assistance, for having discriminated against Mr. Hainze, as a result, on the basis of his disability, and for failing to conduct a self-evaluation as required by the ADA. Hainze contended that these failures and omissions were the direct and proximate causes of his near-fatal shooting.

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[4] After Mr. Hainze filed the subject lawsuit, he was indicted with aggravated assault on Allison by a Williamson County grand jury and later convicted. He pleaded to probated sentence and surrendered his right to appeal.

The trial judge granted summary judgment for all Defendants on all claims.[5] Appendix C. He did not address the ADA or Section 504 issues,[6] other than to give them short shrift in a single sentence: "it is a stretch beyond any reasonable application of the ADA and the Rehabilitation Act...." (App.C at 29a), focusing only on the short confrontation between Hainze and Allison, rather than on the totality of circumstances.

The trial court ignored what caused this tragic incident to occur in the first place, that is, the events that preceded the confrontation and the extent to which the lack of proper policies, procedures, and training caused the confrontation to occur. Rather than focus on the family's call for assistance and the events that preceded the shooting, and how the ADA and Section 504 should have applied to the deputies in that context, the trial judge concentrated solely on the shooting itself.

A Fifth Circuit panel affirmed the district judge, even with his paucity of findings, and held, as a matter of law:

> ... Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's secur-

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[5] Although Petitioner disputes the Court of Appeals' analysis and application of *Sappington v. Bartee*, 195 F.3d 234 (5th Cir. 1999), as to his claim under 42 U.S.C. §1983, this petition addresses only the ADA and Section 504 claims.

[6] There is no dispute that Section 504 applies to Williamson County. Nor is their dispute that Mr. Hainze qualifies as an individual with a disability for purposes of Section 504 and the ADA. 42 U.S.C. §12102(2)(A).

ing the scene and ensuring there is no threat to human life.

App.A. at 12a.

The Court of Appeals rebuffed Petitioner's motion for rehearing *en banc* that he filed because of the widespread ramifications of the appellate ruling and misapplication of the ADA and Section 504.

REASONS FOR GRANTING THE WRIT

I. THE APPLICABILITY OF TITLE II OF THE ADA AND SECTION 504 TO POLICE CONDUCT IN NON-ARREST AND PRE-ARREST SITUATIONS INVOLVING MENTALLY ILL PERSONS IS AN IMPORTANT QUESTION OF FEDERAL LAW AND OF NATIONAL IMPORTANCE THAT THE SUPREME COURT SHOULD SETTLE.

The Supreme Court should consider this case because of the very important public policy concerns implicated -- policy concerns that Congress sought to address in the ADA and Section 504. The extent to which Title II of the ADA and Section 504 apply to non-arrest and pre-arrest situations involving mentally ill persons and especially situations where the person is known to be mentally ill, is obviously an issue of national importance.

Police face this problem daily, year after year, in all facets of their duties and services, all across the nation and in each community. As this case shows, how they handle these situations may have life-or-death consequences for persons with mental disabilities.

This is precisely the kind of national problem that

Congress sought to address by enacting the ADA. Congress recognized the continued discrimination faced by individuals with disabilities in all facets of their lives, including in their encounters with law enforcement officers. Congress created the ADA as a mechanism to address the situation:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C. § 12101(a).[7]

The scope and applicability of the ADA and Section 504 to non-arrest and pre-arrest situations is in need of critical clarification. Resolution of this question is of major concern to persons with disabilities, particularly individuals with mental illnesses, and their relatives, who may need police assistance but do not wish to imperil themselves, loved ones, or friends by requesting such assistance.

Moreover, clarification of the applicability of the ADA

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[7] *See* H.R.Rep.No.101-485, pt.III, 101st Congress, 2nd Sess. (noting that discrimination against the more than 43,000,000 Americans with physical and mental disabilities "continue[s] to be a serious and pervasive social problem").

and Section 504 to non-arrest and pre-arrest situations would enable law enforcement personnel to establish procedures and guidelines for dealing with such situations. Had the County and Sheriff adopted and implemented a clear policy and procedures applying the ADA and Section 504 to the situation in this case, the unfortunate shooting of Mr. Hainze might have been avoided altogether.

There is no doubt, in light of *Yeskey,* that public law enforcement entities, like Respondents Williamson County and Sheriff Richards, fall under the mandate of Title II and Section 504. *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998).

The issue thrust into dispute by the Fifth Circuit is whether the ADA's "services, programs, or activities" clause applies to the non-arrest and pre-arrest activities of law enforcement personnel. The Court of Appeals said no, but that position flies in the face of this Court's clear and unequivocal holding in *Yeskey*, which stated unanimously:

> ... the ADA plainly covers state institutions *without any exception that could cast the coverage of prisons into doubt*.... State prisons fall squarely within the statutory definition of "public entity," which includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government."

524 U.S. at 209-10 (emphasis added).

Just as the ADA, because of its broad and unequivocal language, squarely applied to prisons, so too it would apply with equal force to all aspects of law enforcement services, not just some facets. The ADA has no "functional" exemption for law enforcement officials, as the Court of Appeals would have

it; the ADA applies to all features of police services to the community.

However, despite its breath, the Circuits are taking differing views of *Yeskey* and how the ADA and Section 504 apply to non-arrest services by police departments. This has led to inconsistent opinions among the Circuits. For example, in *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998), the Eighth Circuit, taking an expansive reading of *Yeskey*, held that the ADA applies to police transport of a disabled individual. By contrast, in this case, the Fifth Circuit took a very restrictive view of *Yeskey*, and carefully avoided applying its mandate to law enforcement personnel in non-arrest or pre-arrest situations. The Fifth Circuit relied on *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999), a post-*Yeskey* decision, which itself, although distinguishable here, helps illustrate confusion among the Circuits in applying *Yeskey*.[8]

It is only a matter of time before other appellate courts face the task of determining whether *Yeskey*'s scope extends to non-arrest or pre-arrest situations such as emergency transportation services. This Court need not, and should not, wait until a fatal shooting does occur in a similar circumstance to resolve this issue.

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[8] Trial courts around the country also wrestle with this issue, and some have come to results different from the Fifth Circuit's. *See, e.g., Lewis v. Truitt*, 960 F.Supp. 175 (S.D. Ind. 1997) (denying summary judgment to officers whom plaintiff accused of arresting him because he was deaf during a situation in which officers had come to transfer custody of a child and who claimed he had identified himself as deaf and that officers failed to communicate with him adequately about why they were at the house); *Barber v. Guay*, 910 F.Supp. 790 (D. Me. 1995) (denying officers summary judgment on claim that they failed to properly accommodate plaintiff's psychological disabilities during arrest).

Not only are the Eighth Circuit and other courts at odds with the Fifth Circuit on this point, but so too is the Justice Department, which Congress has charged with enforcing the ADA. In an informational packet about the ADA, the Justice Department writes:

> The ADA affects virtually everything that officers and deputies do, for example: receiving citizen complaints; interrogating witnesses; *arresting*, booking and holding suspects; operating telephone (911) emergency centers; *providing emergency medical services*; enforcing law; and other duties.

Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement (visited August 4, 2000) <http://www.usdoj.gov/crt/ada/q&a_law.htm> (emphasis added).

The Justice Department, through the Attorney General, is directed by Title II to promulgate regulations to effectuate the ADA's purpose. 42 U.S.C. § 12134(a). Clearly, the Justice Department's interpretation of ADA regulations is broader than that of the Fifth Circuit, and clearly would apply to Mr. Hainze's situation. According to the Justice Department, responding to mental health calls is an essential component of law enforcement, and as such, is covered by the ADA.

The lack of national uniformity in applying the ADA and Section 504 to law enforcement services leaves officials and individuals with disabilities wondering what their rights are, and, as this case dramatically attests, may very seriously affect the very lives of people with mental disabilities. This is precisely the problem that Congress sought to correct.

Equally important, police departments are left without guidance as to the extent to which their conduct in responding

to service requests must meet ADA and Section 504 requirements. This lack of guidance unduly exposes law enforcement entities to liability.

Guidance from this Court would eliminate the uncertainties that police and sheriffs' departments face when dealing with mentally ill persons, many of whom are in dire need of treatment. Guidance from the Court would also go a long way in preventing unnecessary tragedies similar to the one that occurred in this case with Mr. Hainze, or even worse.

II. THE COURT OF APPEALS TOOK AN OVERLY-NARROW VIEW OF *YESKEY* THAT CONFLICTS WITH CASE LAW IN OTHER CIRCUITS, CLEAR CONGRESSIONAL INTENT, AND INTERPRETIVE FINDINGS BY THE DEPARTMENT OF JUSTICE.

The Fifth Circuit's opinion conflicts with the unequivocal mandate of *Yeskey* that all services of law enforcement authorities are covered by the ADA. Rather than follow the unambiguous mandate *Yeskey*, the Fifth Circuit instead carved out an absolute exception, without any authority of law, to the applicability of the ADA and Section 504 to law enforcement activities in pre-arrest situations. In so doing, the Circuit summarily discounted *Yeskey* and its progeny without properly distinguishing the decisions that actually undermine its holding here.

The Eighth Circuit decision in *Gorman* is particularly instructive. Gorman claimed that the Kansas City, Missouri Police Department failed to modify its policies and procedures to accommodate the transportation of individuals with spinal cord injuries, and to insure proper training for the officers on how to handle such individuals. 152 F.3d at 910. Like *Yeskey*, *Gorman* highlighted the breadth of the "programs" and "benefits" covered under Title II:

> The fact that [the ADA] can be "applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."

Id. at 912, quoting from *Yeskey*, 524 U.S. at 212 (citation omitted).

Gorman further noted:

> The Department of Justice specified that the statutory term "program" includes "the operations of the agency or organizational unit of government receiving or substantially benefitting from the Federal Assistance awarded, e.g., a police department or department of corrections." [citation omitted] The regulations also indicate that "benefit" includes "provision of services, financial aid, or disposition (i.e., handling, decision, sentencing, confinement, or other prescription of conduct)." The commentary also made clear that "[t]he general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities. [citation omitted].

Id. at 913.[9]

Besides failing to adequately consider *Gorman*, the Fifth Circuit also disregarded clear and detailed Congressional findings. These findings, cited in the House Judiciary Committee Report on the ADA, emphasize the importance of

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[9] The *Gorman* Court recognized that the ADA and Section 504 "must be interpreted broadly to include the ordinary operations of a public entity in order to carry out the purpose of prohibiting discrimination," citing *Innovative Heath Systems v. City of White Plains*, 117 F.3d 37, 44-45 (2nd Cir. 1997). 152 F.3d at 913.

training law enforcement personnel in handling situations involving persons with disabilities so that those situations do not inappropriately deteriorate into arrests. For example, the Report notes:

> In order to comply with the non-discrimination mandate [of the ADA], it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid of seizures.... Such discriminatory treatment based on disability can be avoided by proper training.

H.R.Rep.No.101-485, pt. III, 101st Cong., 2nd Sess. 50.

Just as the House Report suggested, the nearly fatal shooting of Mr. Hainze could have been avoided had the County and Sheriff provided appropriate training and procedures to handle suicide calls and required Deputy Allison and his two colleagues to use that training and those procedures, rather than acting so precipitously.

The Fifth Circuit accepted only a single post-*Yeskey* case for guidance, *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999), and failed to see its factual and theoretical difference from this case. In *Gohier*, a Colorado Springs police officer, investigating actual criminal activity, shot and killed a mentally ill man who confronted him. The Tenth Circuit held the decedent's estate could not establish liability under the facts and theory of the case, and affirmed summary judgment for the officer. *Id.* at 1222.

Though the Fifth Circuit relied heavily on *Gohier*, its facts are nowhere as "strikingly similar," as the Fifth Circuit labeled them. App.A at 9a. First, *Gohier* did not involve a

mental health call for assistance. There, a police officer was called to investigate reports of various crimes of property destruction that were underway. In this case, by contrast, the deputies were dispatched *specifically* to provide a service, that is, transportation to a local hospital for mental health treatment.

Further, in *Gohier*, the officer was alone, without backup, unlike in this case in which three deputies had their guns trained on Hainze. *Id.* at 1218. The officer in *Gohier* also retreated behind his car, and repeatedly ordered the mentally ill man to "drop the knife" or "drop it." *Id.* He finally shot the man after he lunged at him. In this case, Deputy Allison neither gave any warnings to Mr. Hainze nor retreated before shooting him.

Not only are the facts dissimilar, but *Gohier* expressly left open the possibility that inadequate police training and procedures with regard to mentally ill citizens could well subject a governmental entity to Title II liability, which is precisely the issue here. Indeed, the Fifth Circuit, in an ironic twist, while relying on *Gohier* to reach its result, rejected the very theory of liability that *Gohier* held out as a distinct possibility[10] (and that Hainze urged) – that is, accommodating

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[10] The *Gohier* court explained: "Under *Gorman*'s rationale, Gohier might have argued that Title II required Colorado Springs to better train its police officers to recognize reported disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner reasonably accommodating their disability. Gohier, however, did not make any such argument under the ADA below and, on appeal, affirmatively disclaimed reliance on the theory advanced by the plaintiff in *Gorman*. This court thus expresses no opinion on whether a reasonable--accommodation-during-arrest theory could extend to the facts of this case." 186 F.3d at 1222.

a person with a mental disability during an arrest situation.

In addition to its flawed reliance on *Gohier* and overly-narrow reading of *Yeskey*, the factual basis of the Fifth Circuit's decision was also misplaced:

> ...Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring there is no threat to human life.

App.A at 13a.

This statement is wholly inapposite to the facts in this case. Allison had two other officers with him at the scene; they all had their guns trained on Mr. Hainze at three different angles. 6 R 926, 934-36. It is also undisputed that Hainze did not have a firearm. 3 R 430-31.

The deputies made no attempt to talk to or calm Hainze. Moreover, despite the fact that they had him surrounded, with guns drawn, they did not attempt to use anything less than deadly force on a man who was armed at most with nothing more than a pocket knife and who had not committed any violent acts. Allison did not attempt a tactical retreat or give any warning before shooting Hainze through the chest. The deputies acted too hastily for the situation, and inappropriately.

Any of the deputies should have availed themselves of appropriate methods and procedures called for in a potential suicide situation such as this, especially since they knew *in advance of arriving at the scene* that Mr. Hainze was possibly suicidal and might even try to provoke the officers to kill him.

6 R 871. Instead, within a half minute of arriving, Allison had nearly killed Mr. Hainze by shooting him point-blank in the chest with a hollow-point bullet. 6 R 932. Rather than trying to avoid a suicide, Allison nearly accomplished it.

As of January 26, 1993, five years before the shoot-ing, Williamson County and the Sheriff had been required to adapt their procedures to accommodate people with mental disabilities and to handle such calls for assistance differently, if need be, to accomplish the purpose of the ADA and Section 504.[11] They did not do so.

Perhaps the primary reason the County and Sheriff had not adapted their procedures to accommodate people with mental disabilities is that they had not done the self-evaluation required by Title II of the ADA (28 C.F.R. §35.105), which also was required to have been done as of January 26, 1993 -- five years before the shooting.

Both the trial judge and the Court of Appeals, without basis in law and without letting a jury decide this issue, summarily rejected this as a causative element of Mr. Hainze's injury, even though the Court of Appeals admitted that the County and Sheriff had not done the self-evaluation. App.A at 15a.

Nor did the Court of Appeals find, or assert, any exception in law that relieved Respondents of the legal obligation of conducting the self-evaluation and modifying their policies and procedures thereafter.

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[11] 28 C.F.R. §35, App.A, Subpart B ("The general regu-latory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.").

Obviously, the Department of Justice, in promulgating regulations at Congress' direction to implement the ADA to protect people with disabilities, saw an important causal connection, or at least what would likely happen without a self-evaluation.

Surely, had the County and Sheriff followed the law, they would have changed the way they handled mental health calls in suicide situations. Just as surely, had they done that, Mr. Hainze would not have been shot through the chest, point-blank, as precipitously as he was. At the least, this issue should have gone to the jury.

CONCLUSION

In summary, the actions of Respondents clearly violated the letter and intent of the ADA and Section 504.

The Fifth Circuit's decision, which improperly narrows the scope of *Yeskey* to exclude any emergency pre-arrest services provided by law enforcement personnel, is incompatible with the Tenth Circuit's decision in *Gorman* and the Justice Department's interpretation of the ADA and ignores Congress's clear requirement that law enforcement personnel be trained in dealing with individuals with disabilities, and deal with them appropriately.

Consequently, this Court should reverse the Court of Appeals' decision and remand it for decision in light of the legal standards required by the ADA and Section 504. Clear guidelines must be defined for the handling of individuals with mental disabilities in non-arrest and pre-arrest law enforcement situations.

For the reasons set forth above, Petitioner respectfully suggests that the Court should grant this request for writ of certiorari.

August 10, 2000.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
[Filed April 7,200]
No. 99-50222
D.C. No. A-97-CA-845-SS

Kim Michael HAINZE,
Plaintiff-Appellant,
v.
Ed RICHARDS, Williamson County Sheriff;
Steve Allison; Kevin Hallmark; and Scott Zion,
Williamson County Sheriff's Deputies,
individually and in official capacities; and
Williamson County, Texas,
Defendants-Appellees.

Appeal from the United States District Court for the
Western District of Texas, Austin
Sam Sparks, District Judge, Presiding

Before: Politz, Will Garwood, and Davis, Circuit Judges

OPINION

POLITZ, Circuit Judge:
Kim Michael Hainze appeals an adverse summary judgment in his action under 42 U.S.C. § 1983, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. For the reasons assigned, we affirm.

BACKGROUND

In the early morning hours of November 16, 1997, Alicia Cluck made a 911 call requesting that the police transport her suicidal nephew, Kim Michael Hainze, to a hospital for mental health treatment. Cluck advised that Hainze had a history of depression and currently was under the influence of alcohol and anti-depressants, carrying a knife, and threatening to commit suicide or "suicide by cop."[1] Uniformed Williamson County Sheriff's deputies, defendants-appellees Steve Allison, Kevin Hallmark, and Scott Zion, were given this information and dispatched in marked police cars to a convenience store where Hainze was located.

Upon arriving at the store the officers observed a man, believed to be Hainze, standing by the passenger door of a pickup truck occupied by two unidentified individuals. Hainze appeared to be holding the door's handle and talking to the individuals. He had a knife in his hand and was not wearing shoes, despite the cold temperature. Deputy Allison exited his vehicle, drew his weapon, and ordered Hainze away from the truck. Hainze responded with profanities and began to walk towards Allison. At this point, Zion, who was riding with Allison, and Hallmark had also exited their vehicles with their weapons drawn. Allison twice ordered Hainze to stop but Hainze ignored him. When Hainze was within four to six feet Allison fired two shots in rapid succession into Hainze's chest. Allison immediately called EMS. Hainze survived. Approximately twenty seconds elapsed from the time the officers pulled into the store parking lot until Hainze was shot.

On August 21, 1998, Hainze was convicted by a Williamson County jury of aggravated assault with a deadly weapon for his conduct at the convenience store on November 16, 1997. The instant action was filed on November 20, 1997, before Hainze was charged with the criminal offense of which

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[1] "Suicide by cop" refers to an instance in which a person attempts to commit suicide by provoking the police to use deadly force.

he was convicted. Hainze asserted claims against Williamson County Sheriff Ed Richards, the county, and Deputies Allison, Zion, and Hallmark in their individual capacities under 42 U.S.C. § 1983, alleging that they acted with deliberate indifference to his fourth and fourteenth amendment rights by using "excessive, unreasonable, and deadly force against him." He also asserted the same claim against Williamson County and Sheriff Richards in his official capacity for failing to adopt or enforce policies to adequately handle individuals who are mentally ill and in crisis situations, and to protect against the use of excessive and deadly force in such situations. Hainze sought a declaratory judgment, injunctive relief, and damages. In addition, Hainze brought assault and battery claims against the three deputies under Texas law.

Hainze also sought declaratory, injunctive, and compensatory relief under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act against Williamson County and Sheriff Richards in his official capacity. These claims were based on the defendants' alleged failure to establish a policy or train deputies to protect the well-being of mentally ill individuals, for having actually discriminated against Hainze on the basis of his disability, and for failing to conduct a self-evaluation, all of which Hainze contends were the direct and proximate causes of the near-fatal shooting. Summary judgment was ultimately granted in favor of all defendants on all claims. Hainze timely appealed.[2]

ANALYSIS

We review de novo a grant of summary judgment applying the same standard as the district court, viewing the facts and resolving all inferences in favor of the non-movant.[3] "The

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[2] Christopher Cluck, one of the occupants of the pickup truck and Hainze's cousin, joined in Hainze's complaint and asserted various claims against the defendants. Cluck's claims were also dismissed. Cluck has not appealed.

[3] James v. Sadler, 909 F.2d 834 (5th Cir.1990) (citation omitted).

standard of review is not merely whether there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the non-moving party based upon the record evidence before the court."[4] Our review of the record and controlling law persuades that Hainze's claims fail as a matter of law and, thus, summary judgment was appropriate.

Section 1983 claims:

Hainze initially alleged that the defendants violated his rights under the fourth and fourteenth amendments. He has briefed the issue only with respect to the fourth amendment and his fourteenth amendment claim is deemed abandoned.[5] Defendants contend that Hainze's constitutional claims are barred as a matter of law under the Supreme Court's decision in Heck v. Humphrey[6] which held that a civil tort action, including an action under 42 U.S.C. § 1983, is "not [an] appropriate vehicle [] for challenging the validity of outstanding criminal judgments."[7] Heck dictates that when a person such as Hainze brings a section 1983 claim against the arresting officers the district court must first "consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence."[8] If so, the claim is barred unless the conviction has been reversed or declared invalid.[9] In ruling on the summary judgment motion in the instant case, the district court held that Heck did not bar

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[4] Id. at 837 (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

[5] Rutherford v. Harris County, Texas, 197 F.3d 173 (5th Cir.1999) (citing Dardar v. Lafourche Realty Co., 985 F.2d 824 (5th Cir.1993)).

[6] 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

[7] Id. at 486.

[8] Id. at 487.

[9] Id. Hainze waived his right to appeal his conviction.

Hainze's suit because "a conviction for aggravated assault against a police officer does not necessarily preclude a finding of excessive force against the 'assaulter.'" The court went on to find, however, that the defendants were entitled to qualified immunity because their actions under the circumstances were objectively reasonable.

Subsequent to the district court's decision we held that, based on Heck, an excessive force claim under section 1983 is barred as a matter of law if brought by an individual convicted of aggravated assault related to the same events.[10] In the case at bar, the jury found Hainze guilty of aggravated assault with a deadly weapon. Thus, as in Sappington, the force used by the deputies to restrain Hainze, up to and including deadly force, cannot be deemed excessive.[11] Concluding that Hainze has not established a violation of a constitutional right, we need not address whether the individual defendants were entitled to qualified immunity.[12]

Hainze's state law assault and battery claims against the officers are premised on the same basis advanced in support of his constitutional claim. For the above reasons, we conclude these causes of action also were properly dismissed.

ADA/Section 504 claims:

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[13] A "public entity" includes "any department, agency, special purpose district, or other instrumentality of a State or States or local

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[10] Sappington v. Bartee, 195 F.3d 234 (5th Cir.1999).

[11] Id. at 237. Like Hainze, Sappington was convicted of aggravated assault under Texas law.

[12] Id. at 236 (citing Wells v. Bonner, 45 F.3d 90 (5th Cir.1995)).

[13] 42 U.S.C. § 12132 (1994).

government."[14] The language of Title II generally tracks the language of Section 504 of the Rehabilitation Act of 1973,[15] and Congress' intent was that Title II extend the protections of the Rehabilitation Act "to cover all programs of state or local governments, regardless of the receipt of federal financial assistance" and that it "work in the same manner as Section 504."[16] In fact, the statute specifically provides that "[t]he remedies, procedures and rights" available under Section 504 shall be the same as those available under Title II.[17] Jurisprudence interpreting either section is applicable to both.[18] Title II further directs the Attorney General to promulgate regulations to effectuate the statute's purpose.[19]

A disabled plaintiff can succeed in an action under Title II if he can show that, by reason of his disability, he was either "excluded from participation in or denied the benefits of the services, programs, or activities of a public entity," or was

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[14] 42 U.S.C. § 12131(1)(B).

[15] 29 U.S.C. § 794(a) (1994). Section 504 provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." Id. A "program or activity" includes "all of the operations of ... a department, agency, special purpose district, or other instrumentality of a State or of a local government...." 29 U.S.C. § 794(b)(1)(A).

[16] H.R.Rep. No. 101-485, pt.III at 49-50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 472-73.

[17] 42 U.S.C. § 12133.

[18] Gorman v. Bartch, 152 F.3d 907 (8th Cir.1998) (citation omitted).

[19] 42 U.S.C. § 12134(a). Those regulations have been codified at 28 C.F.R. § 35 (1999).

otherwise "subjected to discrimination by any such entity."[20] Neither party disputes that Hainze is a disabled person or that the Williamson County Sheriff's Department is a public entity. The broad language of the statute and the absence of any stated exceptions has occasioned the courts' application of Title II protections into areas involving law enforcement.[21] There is some disagreement, however, whether an arrest falls within the ambit of Title II,[22] and only one court has considered whether Title II applies to in-the-field investigations by police officers that may or may not lead to an arrest.

In Gohier v. Enright[23] the Tenth Circuit recently addressed a case strikingly similar to the one at bar. There the defendant, Officer Enright, responded to a disturbance call shortly after midnight and encountered Lucero, a paranoid schizophrenic, walking down the middle of the road clutching his

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[20] 42 U.S.C. §12132; Patrice v. Murphy, 43 F.Supp.2d 1156 (W.D.Wash.1999) (noting cases brought under either prong of the statute).

[21] See, e.g., Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998) (holding that state prisons are a "public entity" under the ADA); Gorman, 152 F.3d at 912 ("Transportation of an arrestee to the station house is thus a service of the police within the meaning of the ADA."); Lewis v. Truitt, 960 F.Supp. 175 (S.D.Ind.1997) (applying ADA to the arrest of a deaf man where arresting officers knew or should have known the man could not hear but nonetheless arrested him because he did not respond to officers appropriately).

[22] See, e.g., Rosen v. Montgomery County, Maryland, 121 F.3d 154, 157 (4th Cir.1997) ("[C]alling a[n] ... arrest a 'program or activity' of the County ... strikes us as a stretch of the statutory language and of the underlying legislative intent."); Barber v. Guay, 910 F.Supp. 790 (D.Me.1995) (plaintiff's claim that he was denied proper police protection and fair treatment due to his disabilities during the course of his arrest is a valid cause of action under the ADA).

[23] 186 F.3d 1216 (10th Cir.1999).

right hand to his chest.[24] Enright exited his vehicle armed with his nightstick, pepper spray and a pistol, identified himself and asked Lucero to talk to him. Lucero continued walking and Enright ordered him to stop.[25] Lucero stopped for a moment, put his right hand behind his back and again began to approach Enright "at a 'fast pace.'" He then brought his right hand from behind his back and began swinging, in a stabbing motion, an object that Enright perceived to be a knife.[26] Enright ordered Lucero to "drop the knife" and attempted to retreat behind his vehicle. When Lucero reached Enright's vehicle he "either stepped or lunged toward Enright, making a stabbing motion with the object." Enright fired his pistol twice, killing Lucero.[27] The entire confrontation lasted between 20 and 30 seconds. As representative of Lucero's estate, Gohier asserted various claims against Officer Enright and the City of Colorado Springs, and sought to amend her complaint to include claims under Title II of the ADA.

After a careful analysis of arrest cases arising under Title II the Tenth Circuit held that Gohier could not establish a viable claim and affirmed the decision denying the motion to amend. First, the court noted that this case did not fit into the "wrongful arrest"[28] category of Title II claims because Lucero's conduct was not lawful conduct attributable to Lucero's mental illness that Enright perceived as unlawful activity. Indeed, Lucero's conduct of attacking Enright with

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[24] Id. at 1217.

[25] Id. at 1218.

[26] Id.

[27] Id.

[28] The court used the term "arrest" to include arrests, pre-arrest investigations, and "violent confrontations not technically involving an arrest, as in this case." Id. at 1220.

a knife was criminal.[29] Second, the court did not answer the question whether a valid cause of action exists under the second category of Title II arrest cases, the "reasonable accommodation" theory, because Gohier did not claim that Colorado Springs failed to train its police officers properly to investigate and handle situations involving mentally ill individuals in a manner that reasonably accommodates their disability.[30] We, however, must resolve that question and, viewing the facts in the light most favorable to Hainze, now answer it in the negative.

Hainze first claims he was denied the benefits and protections of Williamson County's mental health training provided to its deputies when, in contravention of that training, Allison used excessive and deadly force to restrain him. Specifically, Hainze alleges that Allison never engaged him in conversation to calm him, never tried to give him space by backing away, never attempted to defuse the situation, never tried to use less than deadly force, and never attempted to create any opportunities for the foregoing to occur. We must conclude that this argu-ment fails. A necessary prerequisite to a successful claim under Title II is that a disabled person be denied the benefits of a service, program or activity by the public entity that provides such service, program or activity.[31] Hainze was not denied the benefits and protections of Williamson County's mental health training by the County, Sheriff Richards, or the officers. Rather, Hainze's assault of Allison with a deadly weapon denied him the benefits of that program.

Second, Hainze claims that the county failed to reasonably

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[29] Id at 1221-22.

[30] Id. at 1222.

[31] 28 C.F.R. § 35.101 ("The purpose of this part is to effectuate subtitle A of title II ..., which prohibits discrimination on the basis of disability by public entities.") (emphasis added).

accommodate his disability by "failing and refusing to adopt a policy protecting the well-being of [Hainze], as a person with a mental illness in a mental health crisis situation, thus resulting in discriminatory treatment from [the] sheriff's deputies."[32] He advances the same contentions as raised above, and stresses that the county's policy of treating mental health calls identical to criminal response calls and those not involving people with mental disabilities resulted in his discriminatory treatment.

Despite Hainze's claims, we hold that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life. Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public. Our decision today does not deprive disabled individuals, who suffer discriminatory treatment at the hands of law enforcement personnel, of all avenues of redress because Title II does not preempt other remedies available under the law.[33] We simply

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[32] While Hainze acknowledges that Williamson County has a mental health training program, he asserts that this policy was not enacted in response to the ADA and does not comport with its mandate.

[33] 28 C.F.R. § 35.103. This section is entitled "Relationship to other laws" and provides in subsection (b):

hold that such a claim is not available under Title II under circumstances such as presented herein.

When the officers reached the convenience store parking lot, Hainze was holding a knife and standing next to a pickup truck occupied by two persons. The police did not then know that the persons were unharmed and were related to Hainze. After being ordered to get away from the truck, Hainze immediately walked quickly towards Allison with the knife, ignoring Allison's repeated orders to stop. Allison did not shoot until Hainze was within a few feet. Approximately twenty seconds elapsed from the time the officers drove into the parking lot until Allison fired. Allison's actions were the result of a quick discretionary decision made in self-defense and for the safety of those at the scene. We are not persuaded that requiring Allison and other similarly situated officers to use less than reasonable force in defending themselves and others, or to hesitate to consider other possible actions in the course of making such split-second decisions, is the type of "reasonable accommodation" contemplated by Title II.

Once the area was secure and there was no threat to human safety, the Williamson County Sheriff's deputies would have been under a duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility.[34] That would have put this case squarely within the holdings of Pennsylvania Dep't of Corrections v. Yeskey[35] and the cases that have followed. But that was not the situation at

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Other laws. This part does not invalidate or limit the remedies, rights, and procedures of any other Federal laws, or State or local laws (including State common law) that provide greater or equal protection for the rights of individuals with disabilities or individuals associated with them. Id.

[34] 28 C.F.R. § 35.130(b).

[35] 524 U.S. 206, 118 S.Ct. 1952, 141 L.Ed.2d 215 (1998); Gorman v. Bartch, 152 F.3d 907 (8th Cir.1998).

bar.

Hainze's last contention is that Williamson County failed to conduct a self-evaluation of its existing policies and procedures to ensure that they were ADA compliant and that its failure to do so caused his injuries. Hainze also seeks declaratory and injunctive relief. Our review of the district court's denial of injunctive and declaratory relief is for abuse of discretion. [36]

The regulations issued by the Justice Department require all public entities, within one year of the regulations' effective date, to "evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of [the regulations]" and to modify such services, policies, and practices to the extent necessary to bring them into compliance.[37] The regulations further provide an opportunity for interested persons to participate in the evaluation process by submitting comments.[38] A self-evaluation of Williamson County's existing physical facilities was performed in October, 1992, but no similar evaluation was conducted of the County's policies and procedures in responding to mental health disturbances and effectuating seizures of mentally disabled individuals. Such an evaluation was clearly required of the County to ensure its compliance with the ADA.[39] We do not suggest that the County's law enforcement officers received no training to deal with mental health situations. During the course of their regular training, all officers are required to undergo some measure of mental

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[36] Gabriel v. City of Plano, 202 F.3d 741 (5th Cir.2000).

[37] 28 C.F.R. § 35.105(a).

[38] 28 C.F.R. § 35.105(b).

[39] 28 C.F.R. § 35, App. A, Subpart B ("The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities.").

health instruction, and some officers are certified to handle mental health related issues. Allison was certified as a mental health officer based on his completion of a program offered by the County which included at least sixteen hours of such training. Hainze's causation claim lacks merit. As stated earlier, Hainze's injuries were caused by his own criminal actions, not Williamson County's failure to perform a self-evaluation. Consequently, we hold that Hainze lacks standing to seek declaratory or injunctive relief. A pre-condition to asserting a claim for a declaratory judgment is that a viable case or controversy exist.[40] Further, for an injunction to issue based on a past violation, Hainze must establish that there is "a real or immediate threat that he will be wronged again."[41] Because Hainze cannot state a claim under either Title II or Section 504 the district court did not abuse its discretion in summarily denying the requested relief.

The judgment dismissing all claims against all defendants is AFFIRMED.

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[40] Plumley v. Landmark Chevrolet, Inc., 122 F.3d 308 (5th Cir.1997) (citing Lawson v. Callahan, 111 F.3d 403 (5th Cir.1997)).

[41] Plumley, 122 F.3d at 312 (citing City of Los Angeles v. Lyons, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed May 12, 2000
No.99-50222
D.C. No. A 97 CA 845 SS

KIM MICHAEL HAINZE; ET AL)
Plaintiffs)
KIM MICHAEL HAINZE)
Plaintiff -Appellant)
V.)
)
ED RICHARDS, Sheriff; STEVE)
ALLISON, and various unknown)
Williamson County Sheriff's)
deputies; WILLIAMSON)
COUNTY, Texas; KEVIN)
HALLMARK; SCOTT ZION,)
Williamson County Sheriff's)
Deputies, individually and in their)
official capacities)
Defendants -Appellees)

Appeal from the United States District Court for the
Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Opinion 4/7/00, 5 Cir._____, _____ F.3d _____)

Before POLITZ, GARWOOD, and DAVIS, Circuit Judges.

PER CURIAM

(x) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.ApP.P. and 5TH CIR.R. 35) , the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R.App. P. and 5THCIR.R. 35) , the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/S/
United States Circuit Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED January 28, 1999

NO. A 97 CA 845 SS

KIM MICHAEL HAINZE, et al,)
Plaintiffs)
vs.)
)
ED RICHARDS, Williamson)
County, Sheriff, et al,)
Defendants)
)

JUDGMENT

BE IT REMEMBERED that on this day, the Court entered its order granting summary judgment against Kim Michael Hainze and Christopher Cluck and on behalf of Williamson County, Ed Richards, Steve Allison. Kevin Hallmark, and Scott Zion. and thereafter enters the following judgment:

IT IS ORDERED. ADJUDGED. and DECREED that Kim Michael Hainze and Christopher Cluck TAKE NOTHING against Williamson County. Ed Richards. Steve Allison. Kevin Hallmark. and Scott Zion. and the defendants shall go hence without delay with each party suffering its own costs of court.

SIGNED on this the 28th day of January 1999.

/S/_____
SAM SPARKS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

No. A-97-CA-845-SS

KIM MICHAEL HAINZE, et al.)
Plaintiffs)
vs.)
)
ED RICHARDS, Williamson)
County Sheriff, et al.,)
Defendants)

ORDER

BE IT REMEMBERED that on the 21st day of January 1999, the Court held a status conference in the above-styled cause at which all parties appeared by representation of counsel. The parties were given an opportunity to make oral arguments on all pending motions. After consideration of all motions, briefs, arguments, the case file, and the applicable law, the Court enters the following opinion and order.

Background

In the early morning hours of November 16, 1997, Alicia Cluck make a 911 call requesting that police transport her suicidal nephew, Kim Michael Hainze, to St. David's Pavilion for mental health treatment. Cluck explained that Hainze had a history of depression and was currently under the influence of alcohol and medication, carrying a knife, and threatening to commit suicide or "suicide by cop."[1] Uniformed Williamson County Sheriff deputies were thereafter given this information and dispatched in marked police cars to the convenience store where Hainze was located. Deputy Steve Allison got out of his car, and within twenty seconds, Hainze approached Allison.

[1] "Suicide by copy" refers to the tactic of a suicidal person goading police into shooting that person.

The officers perceived that Hainze was holding a knife in his hand. Allison repeatedly ordered Hainze to stop, but Hainze continued his approach. When Hainze was within four to six feet from Allison, Allison fired two shots in rapid succession into Hainze's chest. Allison immediately called EMS, then went over to Hainze and kicked the knife away from Hainze.[2] Hainze survived the shooting.

An occupied pickup truck was at the scene of the incident, and immediately following the shooting, Deputy Kevin Hallmark went to the pickup with his gun drawn to evaluate the situation. Hallmark told the occupants of the pickup to stay there to provide witness reports of the incident. The occupants of the truck were Tracy and Christopher Cluck, Hainze's uncle and cousin, respectively.

On August 21, 1998, Hainze was convicted by a Williamson County jury of aggravated assault with a deadly weapon in relation to the events of November 16, 1997. The jury found that Hainze "intentionally or knowingly threaten[ed] another with imminent bodily injury" and "use[d] or exhibit[ed] a deadly weapon." *See* Charge of the Court in Cause No. 98-176-K368 (368th Judicial Dist. of Williamson County, August 21, 1998) (Tab 1 to Appendix to Defendants' Motions for Summary Judgment Against Kim Michael Hainze and Christopher Cluck). Hainze voluntarily waived his right to appeal the conviction, and the state conviction is therefore a final judgment against Hainze.

The instant lawsuit was filed before Hainze was charged with the criminal offense for which he was convicted. The suit asserts claims for Hainze under 42 U.S.C. § 1983 for excessive force, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act for failure to accommodate Hainze's

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[2] Hainze offers affidavit evidence alleging he was kicked after he was shot, but the plaintiff offers no evidence of any injury from such alleged kick. Hainze did not recall being kicked, and he did not complaint of any pain from being kicked when he was treated. Furthermore, the defendants offer uncontradicted evidence from a treating nurse that she saw not evidence of any injury from any kick to Hainze.

disability. The suit also asserts claims for Christopher Cluck under Section 1983 for excessive force and false imprisonment, arising out of the officer's pointing the gun at him and telling him to remain in the pickup truck.

Analysis

Rule 56(c) of the Federal Rules of Civil Procedure provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(e) states that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but must set forth specific facts showing there is a genuine issue for trial."

The Court must substantively evaluate the evidence offered by the party who filed the motion for summary judgment (the "moving party") and the party who opposes the motion (the "nonmoving party") to determine whether the evidence raises a "material" fact question which is "genuine." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2510 (1986). If genuine issues of material fact exist, the motion must be denied. The Court can consider as controverting summary judgment evidence any facts admitted by a party in a sworn complaint or in other sworn pleadings. *See Davis v. A.G. Edwards & Sons, Inc.*, 823 F.2d 105, 107-08 (5th Cir. 1987). Both the movant and the non-movant bear burdens of producing evidence in the summary judgment process. *Celotex Corp. v. Catret*, 106 S.Ct. 2548 (1986). The nonmoving party is not entitled to rest on its pleading alone, but must carry the burden of providing evidence of genuine issue of material fact. *King v. Chide*, 974 F.2d 653, 656 (5th Cir. 1992).

In deciding whether to grant summary judgment, the Court should view the evidence in the light most favorable to the nonmoving party and indulge all reasonable inferences in favor of that party. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991). The Fifth Circuit has concluded that "[t]he standard of review is not merely whether

there is a sufficient factual dispute to permit the case to go forward, but whether a rational trier of fact could find for the nonmoving party based upon the record evidence before the court." *James v. Sadler,* 909 F.2d 834, 837, (5th Cir. 1990) (citing *Matshushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.,* 106 S.Ct. 1348, 1356 (1986)). However, "[n]either 'conclusory allegations' nor 'unsubstantiated assertions' will satisfy the non-movant's burden." *Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (1996).

The defendants assert all claims against them are barred as a matter of law under *Heck v. Humphrey,* 114 S.Ct. 2364, 2372 (1994), which states that a Section 1983 claim cannot challenge the validity of outstanding criminal judgments. The defendants argue any finding of liability would necessarily undermine the validity of Hainze's criminal conviction for aggravated assault. The plaintiffs correctly point out that a conviction for aggravated assault against a police officer does not necessarily preclude a finding of excessive force against the "assaulter." A cause of action alleging excessive force under Section 1983 requires a showing of harm that resulted directly and only from the use of force that was clearly excessive to the need, and the excessiveness of which was objectively unreasonable. *Carter v. Fenner*, 136 F.3d 1000, 1010 & n.8 (5th Cir.) *cert. denied*, 119 S.Ct. 591 (1998). Even assuming an individual threatened a police officer with immediate harm with a deadly weapon, the officer could conceivably use excessive force in subduing that individual. However, the summary judgment evidence before the Court demonstrates that Hainze's conviction, considered in light of the rest of the evidence, bars relief in this case.[3]

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[3]As the Supreme Court in *Graham v. Connor,* 109 S.Ct. 1865 (1989),

> [t]he "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . The calculus of reasonableness must embody allowances for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly, evolving-about the amount of force that is necessary in a particular situa-

As the plaintiffs concedes, the criminal conviction of Hainze requires the Court to find that Hainze did assault Allison with a deadly weapon. The uncontroverted evidence shows Hainze was within six feet of Allison when Allison shot him. Hainze argues it would have been more desirable for Allison to retreat, use pepper spray, shoot Hainze in the arm, or use some other measure short of shooting Hainze in the chest. That is irrelevant to this case, however. All that is relevant is whether the defendants acted in an objectively reasonable matter, as opposed to the most desirable manner. The uncontroverted expert evidence before the Court states that Allison behaved in an objectively reasonable manner in shooting Hainze in the chest under the circumstances. *See* Affidavit of Ben Lively (Tab 6 Appendix to Defendants' Motions for Summary Judgement Against Kim Michael Hainze and Christopher Cluck).

Qualified immunity shields state officials from suit for damages provided their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Anderson v. Creighton,* 107 S.Ct. 3034 (19878); *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982). If a defendant's conduct was objectively reasonable in light of clearly established law, that defendant is protected by qualified immunity. *See Ganther v. Ingle*, 75 F.3d 207, 210 (5th Cir. 1996). Under the doctrine of qualified immunity, the question is not whether Allison acted in an optimal manner, but whether he acted in an objectively reasonable manner-and Hainze offers no evidence in opposition to the defendants' expert evidence that Allison acted objectively reasonably. Therefore, the defendants are protected by qualified immunity from suit against them in their individual capacities. Further, the plaintiff fails to raise any genuine issue of material fact showing that the county through its customs, policies, or training was deliberately indifferent and caused Hainze's injury.

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Id. at 1872.

Likewise, the evidence before the Court shows Christopher Cluck's claims fail to raise a genuine issue of material fact. Cluck's excessive force claim requires a showing of harm that resulted directly and only from the use of force that was clearly excessive to the need, and the excessiveness of which was objectively unreasonable. *Carter*, 136 F.3d at 1010 & n.8. Cluck's false imprisonment claim requires a showing of (1) willful detention (2)without consent and (3) without authority of the law. *See Pete v. Metcalfe*, 8 F.3d 214, 218 (5th Cir. 1993). It was objectively reasonable as a matter of law for the deputies to draw their guns after an assault of a police officer with a deadly weapon to secure the area and request that witnesses wait at the scene for a short period of time. As with the allegations of excessive force against Hainze, Cluck has failed to offer summary judgment evidence suggesting these actions were objectively unreasonable in light of the circumstances or that the county engaged in deliberately indifferent policies, customs, or practices that caused a constitutional injury.[4]

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[4] Additionally, as to the excessive force claim, Cluck alleges no physical contact, meaning his claims for psycho-logical damages are precluded as a matter of law by qualified immunity. In order to overcome qualified immunity, a plaintiff must allege a violation of a clearly established constitutional or statutory right. *See Ganther*, 75 F.3d at 210. In *Petta v. Rivera*, 143 F.3d 895, 914 (5th Cir. 1998), the Fifth Circuit held that as of 1990, there was no clearly established constitutional violation when a police officer cause purely psychological damages. Since 1990, Section 1983 excessive force jurisprudence has done away with a "significant injury" requirement. *See Hudson v. McMilliam,* 112 S.Ct. 995, 997 (1992) (Eighth Amendment); *Ikerd v. Blair*, 101 F.3d 430, 434-35 (5th Cir. 1996) (Fourth Amendment). However, the complete lack of any physical contact is another matter entirely. As noted in *Petta*, as of June 9, 1998, the fifth Circuit had "never *squarely held* that non-physical injury is sufficient to establish a violation of the fourth Amendment. *Petta,* 143 F.3d at 909 n.22 (citing *Ikerd,* 101 F.3d at 434 & n.10 (declining to reach the issue of purely non-physical harm in excessive force cases)). Therefore, Cluck's excessive force claims alleging no physical injury are barred as not in violation as clearly established constitutional

Finally, in light of the summary judgment evidence, Hainze's claims under the ADA and Section 504 of the Rehabilitation Act fail as a matter of law. Hainze contends that two recent cases support his causes of action under the ADA. *See Pennsylvania Dep't of Corrections v. Yeskey,* 118 S.Ct. 1952, 1956 (1998) (holding that "the plain text of Title II of the ADA unambiguously extends to state prison in-mates"); *Gorman v. Bartch*, 152 F.3d 907, 913-14 (8th Cir. 1998) (holding that a wheelchair-bound arrestee's claims alleging denial of appropriate post-arrest transportation of the arrestee were appropriate under the ADA and the Rehabilitation Act). After dismissing all ADA claims in February 1998, the Court recently reinstated the plaintiff's ADA and Rehabilitation Act claims against Williamson County because it is unclear after recent developments in the law whether these acts apply to pre-arrest subjects. However, it is a stretch beyond any reasonable application of the ADA and the Rehabilitation Act to suggest they apply against the county when a police officer is being attacked with a deadly weapon. Therefore, based on the evidentiary record before the Court, these claims must be dismissed as well.

In short, the summary judgment evidence shows the plaintiffs have failed to raise a genuine issue of material fact on any of their claims. Summary judgment will be granted to the defendants and all claims will be dismissed with prejudice. Accordingly, the Court enters the following orders:

IT IS ORDERED that the defendants' motions for summary judgment against Kim Michael Hainze [#51] and Christopher Cluck [#52] are GRANTED;

IT IS FURTHER ORDERED that the defendants' motion for leave to file an amended answer [#55] is GRANTED;

IT IS FURTHER ORDERED that the plaintiffs' motion for partial summary judgment [#57] is DENIED;

IT IS FURTHER ORDERED that the defendants' motion to file a supplement [#58] is GRANTED; and

IT IS FINALLY ORDERED that any other pending motions are DISMISSED AS MOOT.

SIGNED this 27th day of January 1999.

/S/
UNITED STATES DISTRICT JUDGE